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Tham Kim Fai@ Tham Kim Fay v Ng Kon Seong

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D4–22–1494 OF 1991
ABDUL MALIK ISHAK J
9 OCTOBER 2006

C *Partnership — Accounts — Right to accounts — Duty on one partner to render accounts to the other partner — Breach of duty — Partnership Act 1961 s 30*

Partnership — Partnership property — Property purchased in the name of one of the partner and his wife — Whether partnership property

D

The plaintiff and the defendant are equal partners in Kim Seong Medical Provisions and Supplies ('partnership business') and the partnership business was registered in October 1982. Due to the existence of animosity between the defendant and the plaintiff and as a result of the conduct of the defendant in running the partnership E business in the way in which he did, the plaintiff filed for the dissolution of the partnership business in 1991. Over the years, the plaintiff through his solicitors sought various orders from the courts with regard to the rendering of the accounts of the partnership business pending the disposal of this suit. The proceedings were delayed because the defendant failed to provide the accounts and documents unless F compelled by the courts and whatever was produced were incomplete. The plaintiff subsequently commissioned public accountants to conduct a valuation exercise on the worth in value of the plaintiff's equal share in business. A report was produced disclosing that the accounts of the partnership business were recorded in an ambiguous, misleading and fundamentally wrong manner reflecting discrepancies and irregularities in the running of the partnership business by the defendant. G The defendant then proceeded, legally speaking, to unilaterally cease the partnership business as at 31 July 2001. The plaintiff had also charged his own property in order to secure an overdraft facility and the defendant then used that overdraft money to pay the balance of the 10% deposit and to settle the private loan taken by the partnership business. The plaintiff also contends that the defendant had used H partnership funds to acquire property in his wife's name and that of his own. The plaintiff now seeks from this court an order that the plaintiff's equal share in the partnership business be bought by the defendant at a fair and just value. The sole issue for determination at the trial is this: what is the value of the defendant's and the plaintiff's respective shares in the partnership business as at the date of cessation, I that is, on 31 July 2001?

Held:

(1) Section 30 of the Partnership Act 1961 ('the Act') imposes a duty on one

partner to render accounts to the other partner. It is a statutory duty and the defendant appears to have breached it. It triggers the principle of uberrimae fide where each partner must deal with his fellow partners honestly and disclose any relevant fact when dealing with them. It is sufficient to show that there is a failure to disclose and the breach of the duty as set out in section 30 of the said Act would be put into motion. There is even no necessity to prove fraud or negligence in order to invoke s 30 of the said Act (see para 14).

(2) An asset acquired at the expense of an individual partner may be considered as a partnership asset. The adjoining shophouse had also become a partnership asset since it was purchased to expand the partnership business and this is so notwithstanding the fact that the purchase was based on the overdraft facility initiated by the plaintiff (see paras 19–20).

(3) By virtue of s 23 of the said Act, property bought with money belonging to the partnership business is deemed to have been bought on account of the partnership business. The defendant in purchasing property in his wife's name and that of his own, the defendant was certainly purchasing that property for the benefit of the partnership business because he used the funds belonging to the partnership business. It is immaterial that the property was purchased in his name and that of his wife (see para 30).

(4) When the partnership business was formed and until its cessation, the plaintiff was not paid any form of salary nor dividends nor allowances. The defendant was solely enjoying the fruits of the partnership business as if it was a sole proprietorship. The defendant too never rendered any accounts to the plaintiff even when the suit was progressing in this court. The accounts drawn up by the defendant's accountants are nicely crafted with the sole purpose of creating a loss situation when the sale turnover shows otherwise. The success of the partnership business would be dependent on many factors; and goodwill is one of them. But it must not be forgotten that the partnership business was also running at a loss from 1996 to 2001. It is certainly not an easy task in determining and in ascertaining the quantum that the defendant should pay the plaintiff in buying over the partnership business. Accordingly, a fair and just value of the plaintiffs share in the partnership business is in the sum of RM774,125.11 (inclusive of the plaintiffs overdue allowances in the sum of RM56,100.00) and it is this sum that the defendant has to pay the plaintiff forthwith (see para 86).

[Bahasa Malaysia summary

Plaintif dan defendan adalah pekongsi bersama di Kim Seong Medical Provisions and Supplies ('perniagaan perkongsian') dan perniagaan perkongsian itu didaftarkan pada Oktober 1982. Oleh kerana kewujudan perseteruan di antara defendan dan plaintif dan disebabkan kelakuan defendan dalam menjalankan perniagaan perkongsian dalam caranya, plaintif telah memfailkan untuk membubarkan perniagaan perkongsian tersebut pada 1991. Dalam tahun-tahun berikutnya, plaintif melalui peguamcaranya telah memohon perintah-perintah daripada mahkamah berhubung dengan pemberian akaun-akaun perniagaan perkongsian sementara menunggu pendengaran tindakan ini. Prosiding telah ditangguhkan oleh kerana defendan gagal

membekalkan akaun-akaun dan dokumen-dokumen kecuali diperintahkan oleh mahkamah dan apa yang diberikan adalah tidak sempurna. Plaintif seterusnya mendapatkan perkhidmatan akauntan awam untuk menjalankan satu penilaian untuk menilaikan perniagaan bahagian plaintif yang sama rata itu. Satu laporan diberikan bahawa akaun perniagaan perkongsian direkodkan dalam keadaan yang tidak jelas, memperdaya dan cara yang secara asasnya salah yang mencerminkan percanggahan dan di luar aturan dalam pengurusan perniagaan perkongsian oleh defendan. Defendan kemudiannya meneruskan, dalam kata undang-undang, secara sepihak menamatkan perniagaan perkongsian itu bermula dari 31 July 2001. Plaintif juga pernah menggadaikan hartanahnya sendiri untuk mendapatkan satu fasiliti overderaf dan defendan kemudiannya menggunakan wang overderaf untuk membayar baki 10% deposit untuk menyelesaikan satu pinjaman persendirian yang diambil oleh perniagaan perkongsian tersebut. Plaintif juga mengatakan bahawa defendan telah menggunakan tabung perkongsian untuk memperolehi hartanah atas namanya dan nama isterinya. Plaintif kini menuntut daripada mahkamah satu perintah bahawa bahagian plaintif yang sama rata itu dibeli oleh defendan pada kadar yang adil dan saksama. Isu tunggal untuk diputuskan di perbicaraan ialah ini: apakah nilai bahagian defendan dan plaintif masing-masing dalam perniagaan perkongsian pada tarikh penamatan, iaitu, 31 July 2001?

Diputuskan:

(1) Seksyen 30 Akta Perkongsian 1961 ('Akta tersebut') mengenakan satu kewajipan atas seorang rakan kongsi untuk memberikan akaun-akaun kepada rakan kongsi yang lain. Ia merupakan kewajipan statutori dan defendan nampaknya telah memungkirinya. Ia mencetuskan prinsip uberrimae fldei dimana seseorang rakan kongsi mesti berurusan dengan rakan-rakan kongsi yang lainnya secara jujur dan mendedahkan fakta yang relevan apabila berurusan dengan mereka. Ia memadai untuk menunjukkan kegagalan mendedahkan dan kemungkiran kewajipan yang dikenakan oleh s 30 Akta tersebut akan terpakai. Tiada keperluan untuk membuktikan fraud atau kecuaian sebelum s 30 Akta tersebut dipakai 9lihat perenggan 14).

(2) Sesuatu aset yang diperolehi melalui pembiayaan seorang rakan kongsi individu boleh dianggap sebagai aset perkongsian. Kedai bersebelahan telah dijadikan aset perkongsian oleh kerana ia dibeli untuk mengembangkan perniagaan perkongsian tersebut meskipun ia dibeli melalui fasiliti overderaf yang dimulakan oleh plaintif (lihat perenggan 19–20).

(3) Melalui s 23 Akta tersebut, hartanah yang dibeli dengan wang kepunyaan perniagaan perkongsian tersebut adalah dianggap dibeli atas akaun perniagaan perkongsian. Apabila defendan membeli hartanah atas nama isterinya dan dirinya, defendan sebenarnya membeli hartanah tersebut untuk manfaat perniagaan perkongsian tersebut oleh kerana dia menggunakan tabung kepunyaan perniagaan perkongsian tersebut. Ia adalah tidak penting hartanah itu dibeli di atas namanya dan nama isterinya (lihat perenggan 30).

(4) Apabila perniagaan perkongsian tersebut ditubuhkan sehingga penamatannya, plaintif tidak dibayar langsung sebarang gaji ataupun dividend mahupun elaun. Defendan sendiri menikmati hasil dari perniagaan perkongsian tersebut

sama seperti seorang peniaga tunggal. Defendan tidak pernah membekalkan sebarang akaun-akaun kepada plaintif walaupun tindakan ini sedang dijalankan dimahkamah. Akaun yang disediakan oleh akauntan defendan adalah diukir dengan baiknya dengan tujuan mengambarkan satu situasi kerugian apabila jualan pusing ganti menunjukkan sebaliknya. Kejayaan perniagaan perkongsian adalah bergantung atas banyak faktor-faktor; dan nama baik adalah salah satu daripadanya. Tetapi ia harus tidak dilupakan bahawa perniagaan perkongsian tersebut juga mengalami kerugian dari 1996 sehingga 2001. Bukanlah satu kerja yang mudah untuk menentukan dan memastikan kuantum yang defendan harus bayar kepada plaintif dalam membeli perniagaan perkongsian tersebut. Dengan itu, satu nilai bahagian plaintif yang adil dan saksama dalam perniagaan perkongsian tersebut adalah jumlah RM774,125.11 (termasuk elaun plaintif yang berjumlah RM56,100) dan jumlah ini defendan harus membayar kepada plaintif serta merta (lihat perenggan 86).]

Notes

For the case on right to accounts, see 10*Mallal's Digest*(4th Ed, 2002 Reissue) para 884.

For the case on partnership property, see 10*Mallal's Digest*(4th Ed, 2002 Reissue) para 984.

Cases referred to

Brett v Beckwith (1856) 26 LJ Ch 130 (refd)
Cajmy Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd [1974] 131 CLR 321 (refd)
Chew Kong Chin v Estate & Trust Agencies (1927) Ltd [1938] MLJ Rep 192 (refd)
Conncll v Bond Corporation Pty Ltd [1992] 8 WAR 352 (refd)
De Tastet v Shaw (1818) 1B & Aid 664 (refd)
Dean v Prince And Ors [1954] 1 AII ER 749 (refd)
Federal Commissioner of Taxation v Everett [1980] 54 ALJR 196 (refd)
Gordon v Gonda [1955] 2 AII ER 762 (refd)
Green v Beesley (1835) 2 Bing NC 108 (refd)
Hadlee v Commissioner of Inland Revenue [1993] AC 524 (refd)
Helmore v Smith (1887) 35 CM 436 (refd)
Hogar Estates Ltd v Shebron Holdings Ltd [1980] 101 DLR (3d) 509 (refd)
Jones v Jones (1870) 4 SALR 12 (refd)
Keith Spicer Ltd v Mansell [1970] 1 AII ER 462 (refd)
Law v Law [1905] 1 Ch 140 (refd)
Morris Robert Syers v Daniel Backhouse Syers And Edward Louis Paraire [1875] AC 174 (refd)
Morris v Barrett (1829) 3 Y & J 3184 (refd)
Noakes v Barlow (1872) 26 LT 136 (refd)
Piddocke v Burt [1874] 1 Ch 343 (refd)
Pooley v Driver (1876) 5 ChD 458 (refd)
R v Robson (1885) 16 QBD 137 (refd)
Richardson v Bank of England (1838) 4 My & Cr 165 (refd)
Saywell v Pope (Inspector of Taxes)(1979) STC 824 (1979) STC 824 (refd)
Smith v Anderson (1880) 15 Ch D 247 (refd)

A *Theivanai Achi (f) v M M Kathirasen Chettiar & Ors* [1941] MLJ Rep 107 (refd)
Tibbets v Phillips (1853) 10 Hare 355 (refd)
Waterer v Waterer (1873) LR 15 (refd)
Wray v Wray [1905] 2 Ch 349 (refd)

B **Legislation referred to**
Partnership Act 1961 ss 2, 3, 22(1), (2), 23, 26(e), (f), 30

Prasad Abraham (Prasad Abraham & Assoc) for the plaintiff.
Francis Brigged (Francis Brigged & Co) for the defendant.

C **Abdul Malik IshakJ:**

THE LEGAL SEMANTICS

D **[1]** A partnership is defined in s 3(1) of the Partnership Act 1961 ('Act') as 'the relation which subsists between persons carrying on business in common with a view of profit'. And by virtue of s 3(2) of the same Act, it excludes the following forms of company or association which would otherwise fall within the definition and, for brevity, I must now reproduce it verbatim:

E Definition of partnership

3 (1) Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

(2) The relation between members of any company or association which is:

(a) registered as a company under the Companies Act 1965 [Act 125] or as a co-operative society under any written law relating to co-operative societies; or

F (b) formed or incorporated by or in pursuance of:

(i) any other law having effect in Malaysia or any part thereof; or

(ii) any letters patent, Royal Charter or Act of the Parliament of the United Kingdom,

is not a partnership within the meaning of this Act

G

[2] The definition of partnership in s 3(1) of the said Act sets out three essential ingredients, namely:

(a) there must be a business;

H (b) carried out in common between the partners; and

(c) with a view to making profit.

This means that, unlike a company, a partnership is simply a relationship governing the rights and duties of the partners and their relationships with the rest of society. The main difference between a partnership and a company is this. A partnership does

I not confer any limited liability on the partners. Thus, a partner is liable without limit for the debts incurred by the other partners in the course of the partnership business.

[3] In sharp contrast, perhaps it is ideal to refer to the case of *Smith v Anderson* [1880] 15 Ch D 247 at 273, CA where James LJ defined "partnership" in a different

way. There, this was what his Lordship said (here I would venture to paraphrase it). That an ordinary partnership is a partnership comprised of definite individuals, bound together by contract between themselves to continue for some joint object either during pleasure or during a limited time and it is essentially comprised of the persons originally entering into the contract with one another. That is certainly an old definition of 'partnership' and it is not suitable in the context of our existing Act. But one thing is certain. That a partnership involves a contract between the partners to engage in a business with a view to making a profit. Indeed, Tindal CJ in *Green v Beesley* [1835] 2 Ring NC 108 at 112 aptly said:

> I have always understood the definition of partnership to be a mutual participation in profit and loss.

[4] But our Act does not say that a partnership is established for the purpose of incurring a loss. The common object under the Act between partners would be to make a profit. It is however reasonable to assume that not all partnerships would thrive and beget profit. It is quite common to see, as a rule, that a partner may contribute either property, skill or labour. So if a person contributes a property without rendering any labour, that person is called a sleeping or dormant partner. However, there are cases where sleeping partners contribute nothing at all (*Pooley v Driver* [1876] 5 Ch D 458 at pp 472– 473) and this is a common denominator in every part of the world. It is always a question of mixed law and fact when one is asked to determine whether there is in existence a partnership between the parties (*Keith Spicer Ltd v Mansell* [1970] 1 All ER 462 and *Saywell v Pope (Inspector of Taxes)* [1979] STC 824).

[5] Upon dissolution of a partnership, the relationship between the partners would be that of a debtor and creditor. And this relationship subsists when the partnership accounts have been finally taken after dissolution and the balance has been ascertained to be owing from one partner to another (*Richardson v Bank of England* [1838] 4 My & Cr 165 at 171 and *De Tastet v Shaw* [1818] 1 B & Aid 664). Before dissolution, partners are not trustees for each other or for their firm (*Piddocke v Burt* [1874] 1 Ch 343), but, after dissolution, the partners may be trustees (*Gordon v Gond* [1955] 2 All ER 762.

[6] It is essential to a partnership that there is a business in existence. Section 2 of the said Act defines 'business' to include every trade, occupation or profession. The basic idea behind the partnership is that the business is set up for the sake of making some money or for obtaining some gain (*R v Robson* [1885] 16 QBD 137). According to s 4(c) of the said Act, the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. However, if losses as well as profits are shared then the presumption of partnership is even stronger (*Green v Beesley; Brett v Beckwith* [1856] 26 LJ Ch 130 and *Noakes v Barlow* [1872] 26 LT 136 Ex Ch).

[7] With these brief legal settings as the basic background, I shall now set out the facts of the case.

FACTS OF THE CASE

[8] After a full trial, the facts may be stated as follows. The plaintiff and the defendant are equal partners in Kim Seong Medical Provisions and Supplies

(hereinafter it is referred to as the 'partnership business') where the principal business consists of the sale of Chinese medicinal products, household products, etc, and the partnership business was registered in October 1982. Due to the existence of animosity between the defendant and the plaintiff and as a result of the conduct of the defendant in running the partnership business in the way in which he did, the plaintiff filed this action in court for the dissolution of the partnership business in 1991. Over the years, the plaintiff through his solicitors sought various orders from the courts with regard to the rendering of the accounts of the partnership business pending the disposal of this suit. The proceedings were delayed because the defendant failed to provide the accounts and documents unless compelled by the courts and whatever was produced were incomplete. Being a partner, the plaintiff is certainly entitled to ask for the accounts of the partnership and he is entitled to exercise that inherent right of his, at any time (*Theivanai Achi (f) v MM Kathirasen Chettiar & Ors* [1940] 1 LNS 111).

[9] It must be borne in mind that the defendant had not complied with an order of the court dated 5 August 1993 wherein the plaintiff had applied to the court for the defendant to exhibit in an affidavit copies of the partnership business accounts that reflected the assets and liabilities of the partnership business and all records and payments and receipts of monies in relation to the running and management of the partnership business for each and every month until the date of the dissolution of the partnership business and to file the said affidavit in court and to serve a copy of the same to the plaintiff on or before 27 September 1993. It must also be emphasised that the partnership business was run by the defendant to the exclusion of the plaintiff. The defendant operated personal bank accounts in his wife's name as well as in his own name. The defendant too mixed the partnership funds with that of his own money. All these happened from 1991 onwards, even before the plaintiff commenced legal proceedings against the defendant. At this juncture, it is ideal to refer to s 26(e) of the said Act.

> Rules as to interests and duties of partners, subject to special agreement
>
> 26. The interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:
>
> *(e) every partner may take part in the management of the partnership business.*

[10] It is this section that must be vigorously applied by this court in ascertaining the interests of the partners in the partnership property. What then is a partnership property? The answer is found in s 22(1) of the said Act which enacts as follows:

> Partnership property
>
> 22. (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm or for the purposes and in the course of the partnership business, are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement:

Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof and the general rules of law applicable thereto but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

[11] And this section requires partnership property to be held for partnership purposes and in accordance with the partnership agreement. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* [1974] 131 CLR 321, partners were held to have an equitable interest capable of taking priority over a later equitable interest such as an equitable charge. In *Federal Commissioner of Taxation v Everett* [1980] 54 ALJR 196, the court categorised the interest as an equitable interest in the nature of a chose in action. Malcolm CJ, in *Connell v Bond Corporation Pty Ltd* [1992] 8 WAR 352, had to decide whether a partner's interest was registrable for land law purposes. After an extensive review of the cases, his Lordship decided that the interest was more than a "mere equity". His Lordship was of the view that it was an equitable chose in action which gave a partner a present beneficial interest in every asset of the firm although it could take effect in possession only on the dissolution of the partnership. The Privy Council, in *Hadlee v Commissioner of Inland Revenue* [1993] AC 524, decided that for New Zealand tax purposes, partners do not have a proprietary interest in the assets of the firm. Reverting back to s 22(1) of the said Act, a partnership property can either be brought into the firm or acquired on account of the firm. This means that any property brought in as capital is partnership property and subsequent acquisitions of capital are also included.

[12] Reverting back to the narration of the facts, the plaintiff subsequently commissioned public accountants to conduct a valuation exercise on the worth in value of the plaintiff's equal share in the partnership business. A report was produced by the plaintiff's public accountants, namely, Messrs Guan & Associates dated 10 October 2001. The valuation exercise,inter alia, disclosed that the accounts of the partnership business were recorded in an ambiguous, misleading and fundamentally wrong manner reflecting discrepancies and irregularities in the running of the partnership business by the defendant. The defendant then proceeded, legally speaking, to unilaterally cease the partnership business as at 31 July 2001. In view of this suit and the non existing relationship between the defendant and the plaintiff and the plaintiff's exclusion from the partnership business, the plaintiff now seeks from this court an order that the plaintiff's equal share in the partnership business be bought by the defendant at a fair and just value. The Lord Chancellor (Lord Cairns) in *Morris Robert Syers v Daniel Backhouse Syers And Edward Louis Paraire* [1875] AC 174 suggested 'that on dissolving a partnership of this kind the ordinary course would be for the court to direct a sale of the assets, and, if necessary, a sale of the concern as a going concern, and to give liberty for proposals to be made by either party to purchase it before the judge in chambers' (see p 183 of report).

ISSUE

[13] The sole issue for determination at the trial is this: what is the value of the defendant's and the plaintiff's respective shares in the partnership business as at the date of cessation, that is, on 31 July 2001?

A REVIEW OF THE AVAILABLE EVIDENCE

[14] In reviewing the evidence, I shall consider the following salient matters:

(a) *Rendering Of Accounts*

B The plaintiff (PW1), in examination-in-chief, testified that whilst he left the running of the partnership business to the defendant (DW1), there existed an understanding that the plaintiff (PW1) was to be briefed on the business of the partnership and to be rendered the accounts of the business on regular intervals. The plaintiff (PW1) was also the co-signatory to the cheques of the partnership accounts. Again, in examination-in-chief, the plaintiff (PW1) testified that from the commencement of
C the business, the defendant (DW1) failed to render regular accounts to him and had on one occasion forwarded to the plaintiff (PW1) four exercise books in his own handwriting which appeared to be a stock list for the year 1985 rather than the formal accounts in order to appraise the plaintiff (PW1) of the accounts of the partnership. Indeed s 30 of the said Act imposes a duty on the defendant (DW1) to
D render accounts to the plaintiff (PW1). It is a statutory duty and the defendant (DW1) appears to have breached it. Section 30 of the said Act enacts as follows:.

> Duty of partners to render accounts, etc
>
> Partners are bound to render true accounts and full information of all things affecting the
E partnership to any partner or his legal representatives

It triggers the principle ofuberrimae fidei where each partner must deal with his fellow partners honestly and disclose any relevant fact when dealing with them. It is sufficient to show that there is a failure to disclose and the breach of the duty as set out in s 30 of the said Act would be put into motion. There is even no necessity to
F prove fraud or negligence in order to invoke s 30 of the said Act. This is what has happened here. The defendant (DW1) has failed to render the "true accounts and full information" to the plaintiff (PW1) pertaining to the partnership business. The language employed in s 30 of the said Act is quite wide. It applies 'to all things affecting the partnership'. Its scope is enlarged and the classic example can be seen in
G the case of *Law v Law* [1905] 1 Ch 140. In that case William Law and James Law were partners in a woollen manufacturer's business in Halifax, Yorkshire. William Law lived in London and took little part in the running of the partnership business. James Law bought William Law's share for £21,000. Later, William Law discovered that the partnership business was worth considerably more and that various assets unknown to him had not been disclosed by James Law. The English
H Court of Appeal held that in principle this would allow William Law to set the contract aside. This was how Cozens-Hardy LJ explained it: Now it is clear law that, in a transaction between co-partners for the sale by one to the other of a share in the partnership business, there is a duty resting upon the purchaser who knows, and is aware that he knows, more about the partnership accounts than the vendor, to put
I the vendor in possession of all material facts with reference to the partnership assets, and not to conceal what he alone knows. This would be followed by the case of *Hogar Estates Ltd v Shebron Holdings Ltd* [1980] 101 DLR (3d) 509, a Canadian case. In that case, Hogar and Shebron were partners in a joint land development scheme. Shebron offered to purchase Hogar's interest by stating that the land was not capable of development since planning permission had been refused by the authorities. At the

time when this statement was made, the facts were true but later Shebron found out that an important obstacle to the granting of planning permission was likely to be overcome. Shebron, however, did not pass this important information to Hogar and the purchase went ahead as planned. The court granted Hogar's request to have the agreement set aside. The court held that it was Shebron's duty to disclose all material facts and that duty extended to correcting an earlier true statement when it discovered that it was no longer accurate. The court also held that there was no misrepresentation and no proof of dishonesty but the fiduciary obligation requires neither of these ingredients.

(b) Purchase Of Adjoining Shophouse

[15] The defendant (DW1) who was running the partnership business on his own accord had approached the plaintiff (PW1) in respect of the purchase of an adjoining shophouse to the partnership business for the purposes of expansion and the plaintiff (PW1) had agreed to that idea. Since the partnership had no money to purchase the adjoining shophouse, the plaintiff (PW1) charged his own property held under PT No: 35890, Pajakan Negeri No: 1546, Mukim of Kuala Lumpur in order to obtain an overdraft facility from Pacific Bank Berhad. The defendant (DW1) then used that overdraft facility to pay the balance of the 10% deposit and to settle the private loan taken by the partnership business.

[16] The plaintiff (PW1) further testified that there was an understanding between the partners that the defendant (DW1) was supposed to charge one of his properties in order to secure the overdraft facility or to deposit an equivalent amount in cash for that purpose but had not done so. In fact, under cross-examination, the defendant (DW1) was unable to produce any charge documents to support his averment that he had charged his own property in order to assist the partnership business to purchase the adjoining shophouse. It was also agreed between the partners that the partnership business would service the loan repayments and interest for the purchase of the adjoining shophouse, yet this was not done. On top of that, even the overdraft facility was not regularised from time to time. In fact, Pacific Bank Berhad had written several times in regard to the arrears of the payment of the loan. There was evidence to show that the plaintiff (PW1) had to settle the excess amounts of RM1,348.67 and RM74,009.23 with interests at the rates of 2.5% and 3% per annum respectively.

[17] When there is a dispute pertaining to property subsequently purchased with partnership profits, two sections in the said Act would be relevant. The first is s 23 of the said Act which enacts as follows:

> Property bought with partnership money
>
> 23 Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

[18] The second would be s 22(2) of the said Act which states as follows:

A (2) Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them, in the absence of any agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land first mentioned at the date of the purchase.

B

[19] Here, in purchasing the adjoining shophouse, the plaintiff (PW1) had charged his own property in order to secure an overdraft facility and the defendant (DW1) then used that overdraft money to pay the balance of the 10% deposit and to settle the private loan taken by the partnership business. It is therefore a correct assertion C to make that an asset acquired at the expense of an individual partner may be considered as a partnership asset. It is also correct to say that s 23 of the Act only applies to 'property bought with money belonging to the firm' that is, that the purchase was done with money which is in itself partnership property. But it is not the case here. A good example as to how s 23 of the Act works can be seen in the case D of *Jones v Jones* [1870] 4 SALR 12. In that case, two brothers, T and A, were general dealers and they bought a shop to use in the business out of the profits of the partnership. The land were conveyed to both brothers as tenants in common. T died intestate. The court held that since the property had been acquired out of partnership profits and used for the partnership business, the property was partnership property E and not owned by the two brothers as individuals.

[20] Section 22(2) of the said Act is worded differently from s 23 of the same Act. Section 22(2) of the said Act presupposes that the profits used to buy the land are the partners' own which they may spend at their will rather than profits which remain F partnership, money. But contrary intention can be shown so that the subsequent property may indeed become a partnership asset. In *Waterer v Waterer* [1873] LR 15 Eq 402, the court had to deal with a similar situation. That was a case where a nursery man carried on a business with his son and that business was not a partnership business. The nurseryman died and left his estate, including the goodwill of the business and the land, to his sons as tenants in common. The sons carried on G the business in partnership and bought more land for the purpose of the business, paying for the purchase out of the father's estate. One son died and the other sons bought the deceased's share of the business using money raised by a mortgage of the additional land. Since the new land had been included in the sale of the deceased brother's share, the learned judge was able to decide that the new land had been H 'substantially involved' in the business and, consequently, had become a partnership asset. Likewise here, the adjoining shophouse had also become a partnership asset since it was purchased to expand the partnership business and this is so notwithstanding the fact that the purchase was based on the overdraft facility initiated by the plaintiff (PW1).

I *(c) The Operation Of The Personal Bank Accounts By The Defendant (DW1)*

[21] The plaintiff (PW1) testified that because of the non-disclosure of accounts to him by the defendant (DW1) in respect of the partnership accounts in *Kwong Yik Bank Berhad and Pacific Bank Berhad*, the plaintiff (PW1) had written to *Kwong Yik*

Bank Berhad as a 50% equal partner and requested the said bank - referring to *Kwong Yik Bank Berhad*, to impose a requirement with effect from 17 September 1990 that withdrawals of monies must be signed by both parties. Arising out of this request, Kwong Yik Bank Berhad agreed that for the operation of the partnership accounts, the issuance of cheques for amounts exceeding RM1,000 or in cash had to be jointly signed.

[22] The defendant (DW1) then resorted to opening three new bank accounts, one account jointly under his name and his wife and another account under his own name at different periods of time between September 1990 to March 1992 in order to channel funds of the partnership business. In fact, the defendant (DW1) and his wife operated his account in Southern Bank Berhad.

[23] The stand of the plaintiff (PW1) was rather simple and straightforward. That the plaintiff (PW1) had never refused to sign any cheques. Rather, the plaintiff (PW1) was never approached with cheques to sign by the defendant (DW1) and the latter had not produced any documentary evidence with regard to cheque books where the plaintiff (PW1) had refused to sign nor did the defendant (DW1) write to the plaintiff (PW1) about the plaintiff's (PW1's) refusal to sign cheques.

[24] The defendant (DW1) has given evidence that the opening of the personal accounts at Southern Bank Berhad was upon the advice of his solicitors Messrs Shafee & Co. The plaintiff (PW1) contends that the personal accounts opened by the defendant (DW1) was for the purposes of operating the accounts of the partnership business in order to avoid the plaintiff (PW1) from co-signing cheques with the defendant (DW1). In fact, the defendant (DW1) did not request his solicitors to write to the plaintiff (PW1) or to the plaintiff's (PW1's) solicitors to inform him that the defendant (DW1) was utilising personal accounts for the partnership business which was done surreptitiously by the defendant (DW1).

[25] It is the contention of the plaintiff's counsel that, during cross-examination, the defendant (DW1) had given inconsistent and contradictory evidence when he stated that the opening of his personal accounts was due to the fact that after the plaintiff (PW1) had written to the bank, many of the suppliers had returned cheques as the cheques purportedly could not be cleared which resulted in the defendant (DW1) opening the personal accounts, yet prior to this the defendant (DW1) had given evidence that his solicitors Messrs Shafee & Co had advised him to open a personal account. In the face of such inconsistent and contradictory evidence, the defendant (DW1) had not produced examples of any cheques which were returned by the suppliers in any of his bundle of documents.

[26] It must be borne in mind that even before the plaintiff had written to *Kwong Yik Bank Berhad* with regard to the co-signatories of the cheques exceeding RM1,000, the defendant had carried on with the running of the partnership business using his personal accounts for almost two years.

[27] It is the plaintiff's contention that the defendant had opened up two personal accounts in Southern Bank Berhad and one personal account in Multipurpose Bank

Berhad wherein partnership monies were being mixed with that of his own. The plaintiff (PW1) had discovered the existence of the Multipurpose Bank Berhad accounts for the partnership business when the defendant's (DW1's) solicitors had forwarded Multipurpose Bank Berhad's statements for the months of September, October and November 1999.

(d) The Financial Records And Books Of The Partnership Business

[28] It is the plaintiff's contention that the plaintiff (PW1) was refused access to the financial records and books of the partnership business which was specifically requested by the plaintiff to be furnished inclusive of the audited accounts. The plaintiff (PW1), in fact, had written to the defendant's solicitors with regard to the various issues of the partnership business and its accounts. The plaintiff (PW1) had, on the advice of his solicitors, filed an application to force the defendant (DW1) to render accounts pending the disposal of the suit wherein such order was granted by the court on 5 August 1993. It is emphasised that the defendant (DW1) had not complied with the order of the court dated 5 August 1993 and that much of these proceedings were delayed because the defendant (DW1) had failed to provide accounts and documents unless compelled to and even after these documents were produced they would be incomplete. In fact, as late as 2001, the defendant (DW1) was still trying to locate accountants to attend to the audit of the accounts.

[29] Eventually, the defendant (DW1) produced what were believed to be the audited accounts for the first three years of the partnership business even though the defendant (DW1) subsequently claimed that the audited accounts had not been completed. The audited accounts that were forwarded did not bear the name of Messrs Leong & Co appearing therein. In fact, the accountants that were engaged by the defendant, namely, Messrs Yong & Co and in particular Mr. Yong Yoong Thiam (DW2) had admitted during cross-examination by the plaintiff's counsel that his firm had not prepared the profit and loss accounts for the years prior to 1995 and had only prepared the profit and loss accounts for the years 1995 to 2001. Mr Yong Yoong Thiam (DW2) also gave evidence that his firm's appointment was specifically to do a review analysis and valuation of the partnership business and not the auditing proper.

(e) Purchase Of Property Using The Partnership Funds

[30] Approximately in the year 1991, the plaintiff (PW1) contends that the defendant (DW1) had purchased a property in his wife's name and that of his own. It is also the plaintiff's contention that the defendant (DW1) had used partnership funds to acquire the property in question. By virtue of s 23 of the said Act, property bought with money belonging to the partnership business is deemed to have been bought on account of the partnership business (*Tibbets v Phillips* [1853] 10 Hare 355; *Helmore v Smith* [1887] 35 Ch D 436 and *Wray v Wray* [1905] 2 Ch 349). In purchasing the property in his wife's name and that of his own, the defendant (DW1) was certainly purchasing that property for the benefit of the partnership business because he used the funds belonging to the partnership business. It is

immaterial that the property was purchased in his name and that of his wife (*Morris v Barrett* [1829] 3 Y & J 384).

(f) Kim Seong Medical Supplies ('KSMS') - A Limited Review For The Period Between January 1987 To December 1993

[31] It must be recalled that the partnership business was unilaterally dissolved by the defendant (DW1) as at 31 July 2001. The plaintiff (PW1) then commissioned public accountants namely Messrs Guan & Associates to conduct a valuation exercise on the worth of the value of the plaintiff's 50% shares in the partnership business (hereinafter referred to as 'the said investigative report'). It is the plaintiff's contention that in commissioning the public accountants, the plaintiff (PW1) also asked them to conduct an independent audit investigation on any potential discrepancies in the statements of affairs and accounts of the partnership business. The investigation involved the examination and review of various documents and financial records available for the period between January 1987 to December 1993 as furnished by the defendant (DW1). The auditors were only able to examine documents and records which were incomplete. Upon investigation of the financial books and records of the partnership business, the value of the plaintiff's share was determined to be in the sum of RM718,025.11 as at 1993 subject to the resolution of the discrepancies raised. Now, the partnership business was valued only as at 1993 as the various documents and records of the partnership business forwarded by the defendant (DW1) were for the period between January 1987 to December 1993. It is the plaintiff's contention that the auditors were unable to ascertain the plaintiff's position as there were no other documents and records forthcoming from the defendant (DW1). When asked during the cross-examination of Mr Teh Beng Yeow (PW2) whether the valuation as at 31 December 1993 would be accurate as the partnership had ceased as at 31 July 2001, Mr. Teh Beng Yeow (PW2) stated that certain assumptions or estimates can be made in order to determine the value of the partnership business as at the date of cessation.

[32] The findings of the said investigative report was based on documents and records that were available for the public accountant and it was further revealed that certain accounts recorded were ambiguous and or misleading and fundamentally wrong. The said investigative report highlighted all these discrepancies and irregularities.

(g) The Discrepancies And Irregularities Highlighted In The Said Investigative Report

[33] Under this head, I shall consider the following categories:

(i) Loans And Tontine

[34] The alleged loans and tontine recorded were questionable in terms of its legality, non bona fidetransactions and lack of proper documentation and details. The tontine receipt transactions came up to RM335,345. Under examination-in-chief, the plaintiff (PW1) gave evidence that his early involvement in tontine transactions was on a personal basis and he had never, at any material time, consented to the

partnership funds being involved in the tontine transactions. According to the plaintiff (PW1), he had no access to the accounts of the partnership and hence he could not have consented to the partnership funds being used in the tontine transactions.

[35] Under cross-examination, the defendant (DW1) stated that by looking at the report prepared by Mr. Yong Yoong Thiam (DW2), the said report showed that the sum of RM335,345 was received as tontine monies according to the record but whether Mr. Yong Yoong Thiam (DW2) checked that the said sum was credited into the partnership business bank account was questionable because the gentleman did not say in his report that he or his auditors had sight of the partnership business bank accounts as proof that these monies had actually been received by the partnership business. In fact, under re-examination, the defendant (DW1) explained that a tontine transaction worked like a loan wherein once received, the partnership business would have to pay the monthly instalments and it was the assertion of the defendant (DW1) that the partnership business had been receiving tontine monies frequently and that gave rise to suspicion as to whether these were really tontine transactions.

[36] The tontine issue that was dealt with by Messrs Yong & Co in their report has failed to address the possible irregularities involving tontine transactions and only highlighted the amount from tontine and other loan transactions that had been substantially settled over the period. It is the plaintiff's contention that what the report failed to address is in regard to the authenticity of the transaction. As most of the tontine and other transactions were in cash and the fact that the defendant (DW1) was the sole active managing partner of the partnership business, the plaintiff (PW1) contends that no documentary evidence has been shown to prove that these were in fact tontine transactions.

[37] By way of a rebuttal, the defendant (DW1) has this to say in regard to the issue of the tontine funds. The defendant (DW1) admits that the partnership business was involved in tontine funds with the active participation of the plaintiff (PW1). The plaintiff (PW1), under cross-examination, admitted to this fact (see p 15 to p 16 of the notes of evidence). The tontine funds chit showing the plaintiff's company Nordic Design as one of the participants can be seen at p 177 to p 179 of Bundle 'B' comprised in the English language translation.

[38] Mr Yong Yoong Thiam (DW2), the defendant's accountant, in his report had analysed and studied the tontine transactions and came to the conclusion that at the end of the day after taking into account all receipts and payments, there was a net receipt of RM810 only. Flowing from all these, the stand of the defendant (DW1) may be stated as follows: that since the plaintiff (PW1) was a participant of the tontine transactions, he cannot complain that it was done without his authority.

(ii) Credit Sales In Kam Seng Medical Hall

[39] Based on the analysis done by the public accountants, the partnership business had recorded full settlement with Kedai Ubat Kam Seng but the receipt transactions

as recorded were questionable because it involved significant actual cash receipts instead of cheque receipts. The analysis showed that Kedai Ubat Kam Seng was able to pay actual cash of RM333,351.71 and a considerably smaller sum in the form of a cheque payment in the sum of RM47,407.28 in order to settle the accounts with the partnership business.

[40] In regard to the defendant's valuation report, the plaintiff (PW1) has this to say. That the report is not supported by any evidence whatsoever to show that the partnership business had a business relationship with Kim Sang Medical Hall in Singapore it is the plaintiff's contention that if this was allegedly true, then the report should have provided documentary proof in the forms of purchase orders, delivery orders, receipts and invoices which the defendant (DW1) had failed to produce.

(iii) Cash Transaction

[41] The said investigative report highlighted the reason for the negative cash in hand balance of RM112,197.08 for the end of December 1993 and a further increase to RM300,338.67 after correcting the opening and closing balances. In my judgment, these negative cash in hand balance could not have legally existed in the world of accounting standards.

[42] The defendant (DW1) contends that the negative cash balance arose as a result of accounting errors. But the plaintiff (PW1) says that this was not accounting errors but rather unrecorded cash.

[43] The defendant's auditors in their report claimed that the negative cash balance in the accounts were due to accounting errors. On the other hand, the plaintiff (PW1) contends that the defendant's auditors did not specify the reason and the nature of such errors. Messrs Yong & Co stated in their report that after the journal adjustments were made, the cash balance became positive yet the defendant's auditors had not adequately addressed the issue as it failed to describe the nature of the journal adjustments. In my judgment, an accounting error that is fundamentally wrong cannot be erased from the accounts without reasonable explanation and proper reconciliation.

(iv) The Defendant's Remuneration

[44] The plaintiff (PW1) under cross-examination agreed that the defendant (DW1) as a managing partner was entitled to a remuneration. However, the plaintiff (PW1) disputed the quantum of the bonuses and the salaries thereto.

[45] In his witness statement (DWS1 of Q37), the defendant (DW1) said that his wife and himself worked for 91 hours per week. According to the defendant (DW1), the salary that was attributable to him was in fact unpaid salaries and bonuses which was recorded in the accounts. Mr Yong Yoong Thiam (DW2) in his report stated that he had studied and analysed the salaries and bonuses and came to the conclusion that the defendant (DW1) and his wife were in fact underpaid.

[46] It is apparent that the remuneration package including bonuses paid to the defendant (DW1) and his wife is being disputed by the plaintiff (PW1). Section 26(f) of the said Act enacts as follows:

> Rules as to interests and duties of partners, subject to special agreement
>
> 26. The interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:
>
> (f) no partner shall be entitled to remuneration for acting in the partnership business.

And Terrell J in *Chew Kong Chin v Estate & Trust Agencies* (1927) Ltd [1938] MLJ Rep 192 aptly said:

> In the absence of special agreement, partners cannot generally claim any special remunerationinter se, even though one or two of the partners may have done all the work.

[47] Messrs Guan & Associates has prepared an analysis of the bonuses paid to the defendant (DW1) by comparing it with the net profit of the partnership business for the years 1990 to 1993 in a tabulated form and it is prepared in this way:

YEAR	Total/Net Profit	Percentage
1990	RM40,000 RM16,385.86	244%
1991	RM40,000 RM19,546.21	204%
1992	RM43,744.74 RM40,000	91%
1993	RM25,000 RM35,272.31	72%

[48] By referring to the tabulated figure, the plaintiff (PW1) contends that whether the bonuses were paid or not, the defendant (DW1) when preparing the net profit and loss accounts had taken the figure of RM145,000 as a bonus expended and this figure should be added back to the valuation of the business. It is the plaintiff's contention that, at all material times, the plaintiff (PW1) was not offered any form of bonus payment by the defendant (DW1) and that even after the commencement of the suit, the defendant (DW1) and his wife were being paid huge bonuses in terms of percentage of the net profit.

(v) The Financial Status Of The Partnership Business

[49] The defendant (DW1) in his witness statement (DWS1) and in his testimony by way of cross-examination and re-examination in court maintained that the partnership business was operating at a loss and was insolvent at the time of cessation of the partnership business. The defendant (DW1) vigorously disputed that the partnership business was valued at almost RM1.5m as indicated in the plaintiff's valuation report. The defendant (DW1) said that the accumulated losses was at RM1.3m as at 1 August 2001.

[50] Under cross-examination, the plaintiff (PW1) made the following admissions (see p 6 of the notes of evidence):

Q: Do you agree that the firm relies on private loan apart from bank loan?

A: In the early part of the business under my wife's name and also when I became the partner in 1986, early 1986, I was aware of the financial difficulty in the partnership from 1982 to 1996 or 1997. So during this period, there was financial problem of the partnership and I was aware of it.

[51] By his own admission, the plaintiff (PW1) was aware of the financial difficulties in the partnership business from 1982 to 1996 or 1997. Yet, the defendant (DW1) argues that the valuation report prepared at the plaintiff's request fixed the value of the partnership business to almost RM1.5m in 1993. The defendant (DW1) submits that in the light of the plaintiff's evidence during cross-examination the valuation as at 1993 ought to be minus RM52,169.54 as put to Mr. Teh Beng Yeow (PW2) during his cross-examination (see p 28 to p 29 of the notes of evidence). Again, the following question was put to the plaintiff (PW1) in cross-examination (see p 14 of the notes of evidence):

> Your accountant valued the partnership almost RM1.5m as at 31 December 1993.
>
> Put: Highly improbable for a firm which commenced in 1982 with a capital of RM 100,000 to be valued almost at RM1.5m in 1993. What have you got to say?
>
> It is not possible A: From October 1982 up to 1985 or 1986 it was only one shop lot. When both partners got the building adjacent to the business on 1 September 1986 the business premises doubled. 2 shop lots into one.

[52] The plaintiff (PW1) did not answer the question but merely said that the partnership business expanded to two shop lots at a certain point of time. In contrast, this is what the defendant (DW1) said about this issue in his witness statement (DWS1 at Q15):

Q: The plaintiff is claiming that the business was valued at RM1,436,050.23 as at 31 December 1993. What do you say to this?

A: This is impossible. The business which started in 1982 with a capital of RM100,000 could not have grown to such an extent to be valued at that price. The plaintiff should realise that the business operated from a shophouse which measured only 22 feet by 70 feet. It was impossible to have generated such huge profits to make firm so valuable from that premises.

[53] Under cross-examination, the defendant (DW1) had this to say on this issue (see p 44 to p 45 of the notes of evidence):

> Q15 of your witness statement shown and he is asked:
>
> Q: From 1986 onwards the partnership expanded to 2 shop lots doubling the size and would your answer be the same as what you stated at Q15?
>
> A: Y.A., I still maintain the answer because at the end of 1986 when the business was expanded to 2 shot lots although the business volume has been increased to more than 10% to 20% in terms of volume however the expenses also increased by double. And then furthermore there is another shop - a competitor next to our shop. Hence the answer is the same as Q15.

[54] From all these, the defendant (DW1) submits that it is highly improbable that the partnership which was essentially a provision cum Chinese medicine shop which commenced operations in 1982 with a paid up capital of RM100,000 would be worth RM1.5 million some eleven years later in 1993. It is emphasised that the valuation of RM1.5m did not include the shophouse. In contrast, the plaintiff (PW1) submits that the shophouse purchased in 1986 at RM380,000 was valued at RM700,000 in 1997. Consequently, the plaintiff (PW1) submits that the plaintiff's valuation report is not flawed because it has arrived at a realistic conclusion.

(vi) The Disposal Of The Stock Of The Partnership Business

[55] Pursuant to an order of the court and as a result of the cessation of the partnership business as at 31 July 2001, an inventory of the stock of the business was taken after a joint inspection and the stock was valued at RM169,417.92 which was eventually sold off without the consent of the plaintiff (PW1). The defendant (DW1) alleges that as a result of the plaintiff (PW1) placing an advertisement in the newspaper announcing that the partnership business had been dissolved, the defendant (DW1) had sold the stock in order to pay off the creditors, yet the defendant (DW1) has not produced any documentary evidence to support his claim.

(vii) The Plaintiff's Valuation Of The Partnership Business

[56] In valuing the partnership business it is always prudent to consider the net worth of the business which is equivalent to the net assets. This would mean that the total assets less liabilities would be the net worth of the business. The plaintiff (PW1) contends that the net worth of the partnership business is RM1,436,054.23 as at 31 December 1993. The defendant (DW1), on the other hand, alleges that the sales of the partnership business decreased by 50% after the highway cut across the access to the partnership business. It is pertinent to refer to p 36 of the bundle of documents marked 'B' under the item 'sales' where the figure of RM2,215,572.16 appears in the profit and loss accounts for the year ending 31 December 1993. And at p 38 of the same bundle under the item 'sales', the figure of RM2,097,618 appears in the profit and loss accounts for the year ending 31 December 1994. Again at p 40 of the same bundle under the item 'sales', the figure of RM1,396,149 appears in the profit and loss accounts for the year ending 31 December 1995. Now, all these figures showed that the profit of the partnership business was not affected by the construction of the highway and that the turnover of the partnership business was good which explains why the defendant (DW1) is continuing to run the business there even after the cessation of the partnership business.

[57] The plaintiff (PW1) submits that after 1993, traffic passed through the area where the partnership business was situated in order to go to Petaling Jaya and Shah Alam. The flow of traffic meant that business flourished in that area. If this was not the case, the defendant (DW1) would not have encouraged his brother to open the shop located nearby to the partnership business.

[58] It is the submission of the plaintiff (PW1) that the construction of the highway would have been profitable to the partnership business and if the profit was decreasing in anyway, it was as a result of the partnership business operating in one shophouse premises instead of two.

[59] The plaintiff (PW1) further submits that based on the sales figures provided by the defendant (DW1)vide the accounts, the plaintiff (PW1) has derived the percentage of profit that the partnership business would have been making in the span of 19 years calculated from the year of incorporation in 1982 until the year of the dissolution of the partnership and that would be in 2001. The plaintiff (PW1) also submits that based on the said investigative report prepared by the plaintiff's auditors, the net worth of the partnership business for the period between 1 January 1987 to 31 December 1993 (for seven years) came up to the sum of RM1,436,054.23. Calculation wise, the average net profit per annum earned by the partnership business would be as follows:

Net worth of KSMS = RM1,436,054.23 = RM205,150.60

Period (1 January 1987 to 31 December 1993)
7 years

So, the per annum net profit is RM205,150.60.

[60] And by incorporating the sales figures as provided by the defendant (DW1) over the span of 19 years, the percentage of net profit per annum derived from the partnership business can easily be determined in this manner:

Sales (between the years 1983 to 2001) =RM25,329,265 /19years

Average sales per annum (1983 to 2001) = RM1,333,119.21

[61] Therefore, the percentage of net profit earned by the partnership business per annum amounts to:

Average net profit per annum =RM 200,000 =15.3%

Average sales per annum (1983 to 2001) = RM1,333,119.21.

[62] So, it can be surmised that the partnership business was deriving a 15.3% net profit per annum based on the sales figures as provided by the defendant (DW1).

(viii) The Plaintiff's Share Of The Partnership Property

[63] The plaintiff (PW1) is also claiming for the sum of RM305,319.28 which relates to the plaintiff's half share to the partnership business and not to his 50% interest in the partnership business nor to the years of non distribution of profit from the partnership business to the plaintiff (PW1). In fact, the sum of RM305,319.28 does not take into account the years the plaintiff (PW1) have spent on servicing the interest for the loan although the plaintiff (PW1) has sold his share of the partnership business property for RM375,000 - which was the net amount that the plaintiff (PW1) received after the deduction of the outstanding loan sum and expenses. It is the plaintiff's contention that the defendant (DW1) had used the partnership funds to settle off the proceeds that were accountable to the plaintiff (PW1).

[64] It must not be forgotten that the defendant (DW1), at all material times, intended to buy the plaintiff's half share in the partnership property by way of a private treaty. It is the submission of the plaintiff (PW1) that if the business of the

A partnership was in fact doing badly, the defendant (DW1) would not have offered to buy over the plaintiffs half share in the partnership property.

[65] Based on the investigative report prepared by the plaintiff's auditors, I must consider the irregularities and the discrepancies found in the said report. I too take
B into account the valuation of the plaintiff's half share in the partnership business bearing in mind that the said valuation is both credible and viable. In addition to that, I too consider that the defendant's valuation report is prepared in a rather superficial manner which failed to examine the financial books and accounts of the partnership business in detail and, ultimately, it failed to counter the discrepancies
C and irregularities as highlighted by the plaintiff's auditors. According to the case ofDean v. Prince And Others[1954] 1 All ER 749, CA, that a valuation report could be impeached, not only for fraud but also for mistake or miscarriage of justice, examples of which would be if the expert made an arithmetical error or took something into account which he ought not to have taken into account orvice versa,
D or interpreted the agreement wrongly, or proceeded on some erroneous principle; even if the court could not point to the actual error, nevertheless, if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the court would interfere. In short, the court has the inherent power to interfere in order to right the wrong.

E **[66]** The plaintiff (PW1) takes issue at the defendant's conduct in the running of the partnership business to the exclusion of the plaintiff (PW1). The investigative report reflects the unresolved discrepancies and irregularities in particular in regard to the cash transactions and remuneration of the defendant (DW1). The defendant's conduct in frustrating the delivery up of the financial books and accounts of the
F partnership business to the plaintiff (PW1) even after being compelled by the court order is clearly indicative that the partnership business was, at all material times, run by the defendant (DW1) himself.

[67] The plaintiff (PW1) now seeks an order that the plaintiff's share be bought
G out by the defendant (DW1) at a fair and just value. So, I reiterate, that the crucial question to pose, after a protracted trial, is what would be the fair and just value for the defendant (DW1) to buy out the plaintiff's share in the partnership business?

[68] It is the submission of the plaintiff (PW1) that in valuing the partnership
H business the expended sum recorded as bonuses would be accounted for in tabulating the net worth of the partnership business which would represent the total assets of the business less liabilities and this would amount to RM1,436,054.23 as at 31 December 1993.

I **[69]** It must be borne in mind that the plaintiff (PW1) was not paid a salary and had demanded that he be paid a sum of RM300 per month as allowance effective from January 1986. But this was not done by the defendant (DW1) and taking into account these unpaid allowances from the period between January 1986 to July 2001, totalling 15 years and 7 months, the plaintiff (PW1) should be paid the accumulated allowances amounting to RM56,100 by the defendant (DW1).

[70] In determining the fair and just value of the plaintiff's share in the partnership business, I was asked to take into account all the above mentioned considerations

[71] In deciding the sole issue for determination as phrased and framed earlier, I must consider whether the valuation report of the defendant's accountant (Mr Yong Yoong Thiam (DW2)) is unrealistic in that it shows a negative value of the partnership business. I must also consider whether the plaintiff (PW1) needs to be compensated in view of the fact that the defendant (DW1) is now running the business as a sole proprietor. By definition a sole proprietor consists of only one member. The assets of the sole proprietor's business are his own, in the eyes of the law, and not those of the business. It is easy for the sole proprietor to close his business. There is not much fuss to it. It is more complicated to close a partnership business. A partnership is usually dissolved by way of an agreement amongst the partners. Here, it was the defendant (DW1) who ceased unilaterally the partnership business on 31 July 2001.

[72] In answer to question 50 of the defendant's witness statement (DWS1 of Q50), the defendant (DW1) stated that in 1998 the plaintiff's then accountant valued the business at RM390,500. The defendant (DW1) went on to say that he had offered the partnership business to the plaintiff (PW1) for that price but the plaintiff (PW1) declined to take over the partnership business. The defendant (DW1) in his witness statement in DWS1 went on to say that the price quoted by the plaintiff's then accountant was excessive. Needless to say, according to the defendant (DW1), it follows that the value put on the partnership business by the plaintiff's subsequent accountant (Mr Teh Beng Yeow (PW2)) is manifestly excessive when compared to that of the earlier accountant.

[73] It must be recalled that during cross-examination, the plaintiff (PW1) said that he knew of the financial problems of the partnership from 1982 until 1996 or 1997 (see p 6 of the notes of evidence). Thus, it is inconceivable for the partnership business to be valued at RM390,500 at this period of time bearing in mind that the plaintiff (PW1) had personal knowledge of the state of affairs of the partnership business. It was for these reasons, that the learned counsel for the defendant (DW1) submitted that the valuation put by Mr Yong Yoong Thiam (DW2) was realistic based on the fact that the partnership business was merely a provision cum medicine shop operating for most of the period from single shop.

[74] Should the defendant (DW1) compensate the plaintiff (PW1) now that the business is run by the defendant (DW1) as a sole proprietor? The learned counsel for the defendant (DW1) submitted that the sum of RM305,307 received by the plaintiff (PW1) from the sale of the 1/2 share in the shoo house in 1997 was more than adequate compensation. And that whatever deposit advanced by the plaintiff (PW1) to buy the shop house was by the plaintiff's own admission repaid using the partnership funds. Even the bank loan was paid using the partnership funds. It was submitted that when the plaintiff (PW1) received the sum of RM305,307 the plaintiff (PW1) did not repay any money to the partnership for the costs of purchasing the shop house. The stand of the defendant (DW1) was this. That it is unjust for the plaintiff (PW1) to come back and demand for more money.

[75] I am asked to make an assumption that if the plaintiff (PW1) did not receive anything from the partnership business since its inception then the plaintiff (PW1) would have a genuine complaint against the defendant (DW1). But it is not the case here. It is submitted that it is the defendant (DW1) who has absorbed all the liabilities of the partnership business and it is the defendant (DW1) who is now trying his level best to keep afloat a sinking ship, so to speak.

[76] At this juncture, it would be ideal to recapitulate the salient points of evidence that are not in dispute:

(a) That the partnership was an equal partnership between the plaintiff (PW1) and the defendant (DW1) since its incorporation.

(b) That the defendant (DW1) managed the partnership business on his own and failed to render accounts to the plaintiff (PW1).

(c) That these present proceedings were commenced by the plaintiff (PW1) on 7 November 1991 and that during the course of these proceedings various orders for rendering of accounts by the defendant (DW1) were made by this court but they were not adhered to by the defendant (DW1). The defendant (DW1) took ten years after the commencement of this suit to furnish the statement of accounts of the partnership business and it was only done in 2001 after much delay. The defendant (DW1) admitted during cross-examination that he prepared the accounts himself. In fact, the directions of the court was for these accounts to be prepared by Messrs Leong & Co. The defendant (DW1) resorted to using his personal accounts because if the partnership bank accounts were used it would require the plaintiff's signature for anything more than RM1,000.

(d) This whole suit and the duration it took was attributed mainly to the conduct of the defendant (DW1) in failing to render a proper set of accounts of the partnership business despite assurances to do so at various stages of this case.

(e) During the same period whilst the suit was still pending, the defendant (DW1) continued to run the partnership business right until the time of cessation of the partnership business on 31 July 2001 and thereafter the defendant (DW1) continued running the business under the name and style of Kedai Ubat Gin Siang which, in Mandarin, the Chinese character is also pronounced as Kim Seong Medical Hall in Cantonese.

[77] The fact of the matter is this. That the plaintiff (PW1) is withdrawing from the partnership business which continues to be run by the defendant (DW1). In the absence of the partnership agreement, the defendant (DW1) has continued and do continue to run the business. In the circumstances, this court has to conduct an inquiry as to the market value of the plaintiff's share and the payment of that market value by the defendant (DW1). The following write-ups in *'Lindley & Banks On Partnership', 16th Ed by RC I'Anson Banks* at p 458 to p 459 merit reproduction. There it was written as follows:

> In the absence of any express provision in the agreement, the entitlement of the deceased or outgoing partner in respect of his share will, in the normal way, strictly be represented by his proportionate share in the net proceeds remaining after all the partnership assets have

been sold and the partnership debts and liabilities paid and discharged. However, where there is an implied recognition on the part of the outgoing partner that the other partners will continue the business, those other partners will be treated as entitled to acquire his share at a valuation and the court will direct the necessary accounts and inquiries for that purpose (*see Sobell v. Boston [1975] 1 WLR 1587*). If, on the other hand, there is no such implied recognition but the other partners wish to carry on the business and are prepared to pay the outgoing partner the market value of his share, the court may, in its discretion, refuse to order a sale of the partnership assets and order an inquiry as to the market value of the share and the payment of that value by the continuing partners (*see Syers v Syers [1876] 1 App Cas 174*). And (*see Rivett v Rivett [1966] 200 EG 858*). However, the latter discretion is exercised sparingly and, as a general rule, only when the outgoing partner's share is of modest size or when, as in the case of a professional firm, a sale of all its assets, including goodwill, is regarded as impracticable.

[78] The plaintiff (PW1) conducted an analysis of the accounts drawn up because if the defendant (DW1) was required to furnish a new set of accounts, judging from past conduct, it might take another ten years. The analysis of the accounts conducted by the plaintiff (PW1) may be stated as follows:

(i) that the total turnover according to the sales for the period of 1983 to 1 August 2001 of the partnership business, bearing in mind that the nature of the business is based on cash payment was in the sum of RM25,329,265;

(ii) that the total gross profit of the partnership business for the period between 1983 to 1 August 2001 was in the sum of RM2,047,365;

(iii) that the operating expenses of the partnership business particularly in the following areas came up to:

(a) the defendant's salary from 1983 to 2001 was in the sum of RM751,200 whereas the plaintiff (PW1) was not even paid an allowance or a dividend;

(b) the salaries and wages of the staff from 1983 to 2001 came up to RM382,568 and it fluctuated over the years which should not be the case; and

(c) the term loan interest from 1996 to 2001 was in the sum of RM315,045

(iv) that in so far as the rentals were concerned, for the years 1995 and 1996 it showed no rental amount

(v) that for 1997, the rental amount came up to RM28,000; while in 1998 it soared up to RM48,000 followed by RM42,000 for the years 1999 and 2000; and

(vi) that in so far as the stocks were concerned, it showed a value of RM480,000 in the year 2001 although the actual stock value was only RM169,417.92 as per p. 80 of the bundle of documents at Part 'B'.

[79] It is the submission of the plaintiff (PW1) that the profit and loss accounts for the years 1983 to 2001 clearly indicates that the partnership business did make a profit from 1984 to 1995 and, subsequently, from 1996 to 2001 the partnership business was running at a loss. It must be borne in mind that the defendant (DW1) himself admits to preparing the partnership accounts for the years 1983 to 2001 and

because of this admission the plaintiff (PW1) submits that the partnership accounts for those years could have been manipulated by 're-adjusting' the accounts in order to show that the partnership business was purportedly running at a loss. It must also be borne in mind that the defendant (DW1) was using his personal bank account in the partnership business since 1991 and the defendant (DW1) altogether used three personal bank accounts. It is for this very reason that the defendant (DW1) admitted that he personally handled the partnership accounts.

[80] When one peruses through the profit and loss accounts particularly in regard to the salaries of the defendant (DW1), the following observations may be recorded. That the defendant's salaries over the years had increased substantially per annum. In 1983, the defendant's purported salary was RM9,600. In 1984 to 1985, the defendant's salaries were in the region of RM16,800. In 1987 to 1988, the defendant's salaries increased to RM25,000. In 1989 to 1993, it was in the region of RM48,000 and in 1994 to 1995 it increased to RM72,000 before it decreased to RM48,000 from 1996 to 2000. According to the learned counsel for the plaintiff (PW1) that these unapproved salaries extended to the defendant (DW1), the quantum of which was not consented to by the plaintiff (PW1) as an equal partner of the partnership business, should be returned to the partnership business. Apart from the hefty salaries for the defendant (DW1) and his wife, the defendant (DW1) and his whole family enjoyed free food and lodging all these 19 years (see p 10 to p 11 of the notes of evidence).

[81] It is to be noted that from the year 1996, the partnership business was servicing term loan interest. In fact, from 1983 to 1995, interest amounted to RM4,045. It is the submission of the plaintiff's learned counsel that the defendant (DW1) had failed to provide the necessary evidence or any documentary evidence to show that a term loan was obtained from any financial institution. It is also the submission of the learned counsel for the plaintiff (PW1) that the loan was not consented to by the plaintiff (PW1) as an equal partner of the partnership business. It is pointed out that the term loan interest could have been a consequence of the loan incurred by the defendant (DW1) for the purchase of the 1/2 share of the shop house from the plaintiff (PW1) by virtue of an agreement dated 13 January 1997.

[82] The valuation report furnished by the plaintiff's public accountants, namely, Messrs Guan & Associates dated 10 October 2001 is exhaustive and it provides a thorough analysis of the accounts whereas the defendant's accountants by the name of Messrs Yong & Co merely attempts to punch holes or to criticise the plaintiff's public accountants' report. It must be emphasised that the valuation of assets by an expert must be accepted and cannot be attacked or assailed on the grounds that a lower valuation has been obtained elsewhere. In my judgment, the valuation report furnished by Messrs Guan & Associates can be categorised as a 'speaking valuation report' where the reasons for the calculations were given and they were not made on an erroneous basis. I have seen the valuation report prepared by Messrs Guan & Associates. After analysing the accounts and the problem areas, the auditor came to the conclusion that the net worth of the partnership business as at 31 December 1993 was RM1,436,050.23 and the plaintiff's 50% share of the net worth is RM718,025.11 as at 31 December 1993.

[83] It is the contention of the learned counsel for the plaintiff (PW1) that the sum of RM305,307 that was paid to the plaintiff (PW1) was for the half share of the interest in the land held under H.S (D) 27828 P.T. 16669, Mukim of Petaling together with a four storey building erected on it. It was, according to the plaintiff (PW1) never meant to be for the share of the partnership business. It is submitted that the defendant (DW1) is now the sole proprietor of the business which is now worth about RM1 million at the present date. And it is said that after having acquired the whole business from the plaintiff (PW1), the defendant (DW1) stands to benefit from the said business by himself.

[84] The plaintiff (PW1) contends that he has advertised in the newspaper regarding his resignation as a partner of the partnership business and that after the advertisement right up to the present date, after a lapse of five years, not a single creditor has taken any action against the plaintiff (PW1). This clearly shows, so the submission goes, that the partnership business was in fact a viable business venture.

[85] It is also the contention of the plaintiff (PW1) that after the cessation of the partnership business on 31 July 2001, the defendant (DW1) had the option to close the business because the stand of the defendant (DW1) was that the partnership business suffered heavy losses all these years. Yet the defendant (DW1) chose to continue with the same business, using the same name and functioning on the same premises. The defendant (DW1) too enjoys the patronage of the same customers. So it can be surmised that the defendant (DW1) is still holding, to his benefit, the goodwill of the partnership business in trust for the plaintiff (PW1). And the goodwill of the partnership business would include its assets, property, effects, stocks as well as the existing faithful customers. All these must be taken into account when determining the value of the defendant's and the plaintiff's respective shares in the partnership business at the date of cessation. The simplest method in assessing goodwill of the partnership business is essentially based on the profit obtained and taking into account the gross sales and expenses over a period of five years or even more. Taking the accounts for 1984 to 1995, the partnership business was making profit and the value of the shares of both the parties should hinge on that. This is the approach recommended by '*Lindley & Banks on Partnership [17th Ed] by RC I'Anson Banks* at p 252 thereof. But the learned author acknowledged that the 'true value' of the goodwill 'will fluctuate with the fortunes of the firm' (see para 10-177 at p 252 thereof).

[86] It is part and parcel of my judgment that when the partnership business was formed and until its cessation, the plaintiff (PW1) was not paid any form of salary nor dividends nor allowances. The defendant (DW1) was solely enjoying the fruits of the partnership business as if it was a sole proprietorship. The defendant (DW1) too never rendered any accounts to the plaintiff (PW1) even when the suit was progressing in this court. The accounts drawn up by the defendant's accountants are nicely crafted with the sole purpose of creating a loss situation when the sale turnover shows otherwise. The plaintiff (PW1) now seeks from this court an order that the plaintiff's equal share in the partnership business be bought by the defendant (DW1) at a fair and just value. The success of the partnership business would be dependent on many factors; and goodwill is one of them. But it must not be forgotten that the

partnership business was also running at a loss from 1996 to 2001. It is certainly not an easy task in determining and in ascertaining the quantum that the defendant (DW1) should pay the plaintiff (PW1) in buying over the partnership business. All the considerations mentioned in this judgment must be taken into account. It has, in fact, been taken into account. Accordingly, I would assess the fair and just value of the plaintiff's share in the partnership business to be in the sum of RM774,125.11 (inclusive of the plaintiff's overdue allowances in the sum of RM56,100) and it is this sum that the defendant (DW1) has to pay the plaintiff (PW1) forthwith. Costs should also rightly accrue to the plaintiff (PW1).

Costs to plaintiff.

Reported by Sally Kee